Supreme Court, U. S.
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No. 75-1878

IN THE

Supreme Court of the United States

October Term, 1975

ESTHER A. LANDGRAFF, Appellant

v.

A. G. WAGNER, M.D.; SAMARITAN HEALTH SERVICES, a corporation; GOOD SAMARITAN HOSPITAL, a business association; and FRANK R. PRECHENY, M.D., Appellees

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On Appeal From
The Supreme Court of Arizona

JURISDICTIONAL STATEMENT

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June, 1976

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SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

ESTHER A. LANDGRAFF, Appellant

v.

A. G. WAGNER, M.D.; SAMARITAN HEALTH SERVICES, a corporation; GOOD SAMARITAN HOSPITAL, a business association; and FRANK R. PRECHENY, M.D., Appellees.

On Appeal From
The Supreme Court of Arizona

JURISDICTIONAL STATEMENT

This is an appeal from the final order of the Supreme Court of Arizona, entered on March 30, 1976, denying appellant's Petition for Review, and from the decision and Opinion of the Court of Appeals of the State of Arizona entered on February 5, 1976, affirming the constitutionality of the Arizona medical malpractice statute of limitations, Arizona Revised Statutes, § 12-542(B). The Arizona legislature by that statute denied appellant

a right to sue to recover damages for injuries resulting from medical negligence, before she even knew she had been injured by the negligence of a physician. Substantial federal questions are presented, justifying plenary consideration by the United States Supreme Court for their resolution.

THE OPINIONS BELOW

The opinion of the Court of Appeals of the State of Arizona is reported at 546 P.2d 26 and appears herein as Appendix A. The Order denying review by the Supreme Court of the State of Arizona is unreported, but appears as Appendix B to this statement.

JURISDICTION OF THIS COURT

(1) Esther Landgraff, brought an action in the Superior Court of the State of Arizona on December 6, 1972, for the recovery for injuries caused by medical negligence. The Superior Court granted defendants' motion for summary judgment and dismissed appellant's action for the reason that it was not filed within the statutory period of six years from the date of injury, as required by Arizona

Revised Statutes, § 12-542(B), although appellant was unaware that she had been injured by medical negligence until the six (6) year period had lapsed.

Appellant contended that Arizona Revised Statutes, § 12-542(B) is invalid because it is repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States as a violation of the due process and equal protection clauses.

The Court of Appeals of the State of Arizona held that the statute of limitations for medical malpractice suits was valid and not unconstitutional. The Court of Appeals remanded the case for determination of the question of whether the defendant physicians fraudulently concealed the fact of injury from the plaintiff.

(2) The decision and Opinion of the Court of Appeals was entered on February 5, 1976. Rehearing by the Court of Appeals was denied on March 8, 1976. The Supreme Court of the State of Arizona denied appellant's Petition for Review on March 30, 1976. This is a final order rendered by the highest court of the State. The Notice of Appeal was filed in the Superior Court of the State of Arizona in and for the County of Maricopa, Arizona, the court possessed of the record,

on June 25, 1976. Copies of the Notice of Appeal were filed with the Court of Appeals and Supreme Court of the State of Arizona.

(3) Jurisdiction of this court is invoked under Title 28 of the United States Code, § 1257(2).

(4) Cases sustaining the jurisdiction of this court are:

Wilcox v. Plummer, 29 U.S. 172 (1830);

Canadian Northern Railway Co. v. Eggen, 252 U.S. 553 (1920);

Atchafalafa Land Co. v. F. B. Williams Cypress Co., 258 U.S. 190 (1922);

Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951).

(5) The validity of Arizona Revised Statutes, § 12-542(B) is herein questioned. The full text of the statute:

"A cause of action for injury or death against a physician or surgeon, dentist, registered nurse, dispensing optician, optometrist, registered physical therapist, podiatrist, licensed psychologist, osteopath, chiropractor, licensed clinical laboratory director, naturopath,

or a licensed hospital as the employer of any such person, based upon such person's alleged professional negligence, or for rendering professional services without consent, or for error or omission in such person's practice, shall accrue as of the date of injury and shall be commenced and prosecuted within six years after the date of injury or two years after the injured party discovers or through the use of reasonable diligence should have discovered the malpractice, whichever period first occurs. These time limitations shall be tolled for any period during which such person has failed to disclose any act, error or omission upon which such action is based and which through the use of reasonable diligence should have been known to him."

QUESTIONS PRESENTED BY THE APPEAL

1. Is the Arizona medical malpractice statute of limitations an unconstitutional denial of due process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution as applied to appellant Esther A. Landgraff, because the statute barred her claim for injury caused by medical negligence before she knew that she had been injured by a physician?

2. Does the Arizona medical malpractice statute of limitations deny appellant Esther A. Landgraff, equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution because the statute bars her claim for injury due to medical negligence, while her claim would not be barred if she were injured by someone other than a licensed medical care provider?

STATEMENT OF THE FACTS OF THE CASE

Appellant Esther A. Landgraff brought a medical malpractice action against appellees after the discovery and removal of a six-inch steel hemostat from her abdomen. The blood clamp had been left inside of appellant after gall bladder surgery undertaken first on September 25, 1962, by appellee A. G. Wagner, M.D. and again on November 15, 1962, by appellee A. G. Wagner, M.D., assisted by appellee Frank R. Precheny, M.D. Both operations were performed at appellee Good Samaritan Hospital, which provided surgical assistants and equipment.

Following the operation of November 15, 1962, the hemostat remained undiscovered for nine years. On September 8, 1971, the instrument was discovered by x-ray at the emergency room at Good Samaritan Hospital and was surgically removed on September 11, 1971. This action was brought on December 6, 1972. (A.R. 1)

The appellees moved for summary judgment and the trial court granted judgment dismissing the action against all defendants on the ground that appellant failed to commence her action within six years after the

date of injury, as required by Arizona Revised Statutes, § 12-542(B). (A.R. 68)

Appellant in her opposition to the summary judgment raised the constitutionality of the statute. (A.R. 35-37) The trial court found A.R.S. § 12-542(B) constitutional. (A.R. 58)

Appellant objected to the proposed form of judgment and again asserted the repugnance of § 12-542(B) as a violation of the Constitution of the United States because it abrogated the right of action against a medical care provider before the injured person knew or reasonably should have known of the fact of injury. This, appellant argued, was in derogation of the equal protection clause and deprived the injured person of due process of law. (A.R. 59-60)

On October 22, 1973, judgment was entered against appellant notwithstanding. (A.R. 75)

On December 13, 1973, appellant appealed to the Court of Appeals and the Supreme Court of the State of Arizona from the trial court judgment, specifically asserting the violation of the United States Constitution. (A.R. 88-89; Appellant's

Opening Brief, 38-43) Appellant expressly argued that § 12-542(B) violated the Fifth and Fourteenth Amendments to the United States Constitution by depriving the injured person of due process and equal protection of the law since it abrogated the right to recover for injuries caused by medical negligence before the injured individual discovered injury. (Opening Brief 38-43)

On February 5, 1976, the Court of Appeals of the State of Arizona held A.R.S. § 12-542(B) constitutional and valid as to both the equal protection and due process clauses. 546 P.2d 26 at 30-32. (Appendix A) The Court of Appeals remanded the case for determination of the question of the appellees fraudulent concealment of the fact of injury from appellant. 546 P.2d at 34.

Appellant moved for rehearing before the Court of Appeals, again asserting the constitutional issues, and rehearing was denied on March 8, 1976. On March 15, 1976, appellant petitioned for review by the Supreme Court of the State of Arizona. The memorandum decision of March 30, 1976, denied review. (Appendix B) The Supreme Court of Arizona is the highest court in the State of Arizona.

Notice of Appeal to the United States Supreme Court was filed with the Superior Court of Arizona for the County of Maricopa on June 25, 1976. (Appendix C) Copies were filed with the Court of Appeals and the Supreme Court of the State.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented on this appeal have never been passed upon by this court. With the recent social crisis over medical malpractice affecting citizens of every state and resulting legislative fervor, matters of due process and equal protection must be of fundamental concern. The Arizona statute of limitations for medical malpractice abrogates an individual's right to recover damages for injury caused by negligence of a licensed physician after six (6) years from the date of injury, regardless of the injured person's discovery of the fact of injury. Fundamental rights protected by the federal Constitution are violated by this scheme.

1. To deny a plaintiff her right to assert a claim for injury before she is

aware that she has been injured by the negligence of another is an egregious deprivation of due process. A.R.S. § 12-542(B) prevents the bringing of a cause of action against a physician after six years from the date of injury or two years from the date of discovery of the injury, whichever occurs first. If the injured person does not discover the fact of injury within six years, suit cannot be brought. Injury caused by a medical care provider often remains unknown to the patient or does not manifest itself until the time to bring suit has passed. The classic example is the foreign object, but others are drugs resulting in bone and blood changes and blindness or birth traumas resulting in mental retardation or sensory loss. Individuals suffering from such cataclysmic loss go uncompensated if the injury remains undiscovered or does not manifest itself until six years after the negligent act.

In Urie v. Thompson, 337 U.S. 163 (1948), this court held that a plaintiff's claim under the F.E.L.A. could not be lost by his failure to discover his injury within the time period of the statute of limitations.

The court recognized that notice or discovery of the fact of injury was a fundamental requirement of due process for the operation of a statute of limitations.

The right to maintain an action for redress is one of the fundamental privileges guaranteed and protected by the Constitution. Chambers v. Baltimore & Ohio Railway Co., 207 U.S. 142 (1907)

However statutes of limitations have usually been upheld by this court when they are reasonable in their terms and not manifestly unjust. Christmas v. Russell, 72 U.S. 290 (1866); Canadian North Railway Co. v. Eggen, 252 U.S. 553 (1920).

Nonetheless the policy of repose in statute of limitations is frequently outweighed where the interests of justice require vindication of a plaintiff's right to recover for injury. Burnett v. New York Central Railway Co., 380 U.S. 424 (1964).

The strict command of the statute of limitations must be tempered by considerations "deeply rooted in our jurisprudence." Glus v. Brooklyn Eastern Terminal, 359 U.S. 231, 232 (1958). This the highest court

of the State of Arizona refused to do.

When a state statute of limitations is unreasonable in its terms and manifestly unjust in its application, it must be struck down as an unconstitutional violation of due process of law. A.R.S. § 12-542(B) is patently unjust and was intentionally enacted to avoid the application of the principle of notice or discovery. Landgraff v. Wagner, 546 P.2d 26 at 33; Mayer v. Good Samaritan Hospital, 14 Ariz. App. 248, 482 P.2d 497 (1971).

Other states which have considered the constitutionality of a strict limitation have adopted the discovery rule to guarantee their citizens due process of law. In Frohs v. Greene, 452 P.2d 564 (1969), the Supreme Court or Oregon held that it was "manifestly unfair and unrealistic to bar a negligently injured party's cause of action before he has an opportunity to discover that it exists." In Ayers v. Morgan, 154 A.2d 788 (1959), Justice McBride of the Pennsylvania Supreme Court stated that "the restrictions imposed may not be so arbitrary as to preclude a reasonable opportunity for one who has been harmed to make his claim." He found that without

the application of the discovery rule, the Pennsylvania statute of limitations would be unconstitutional. In Lipsey v. Michael Reese Hospital, 262 N.E.2d 450 (1970), the Supreme Court of Illinois noted that a statute of limitations which bars an action before the plaintiff learns of the negligent acts raised serious constitutional questions. In Dyke v. Richard, 213 N.W.2d 185 (1973), the Supreme Court of Michigan held that a statute of limitations could not abolish the right of an injured person to bring suit "who does not know or in the exercise of reasonable diligence could not ascertain . . . that he has a cause of action." Such a law of limitations, the court said, could not be enforced. With a statute of limitations similar to the one in Arizona, the court noted that while the legislature might abolish the right of action for malpractice altogether, it could not, under the guise of a statute of limitations, destroy an otherwise valid cause of action before the injured person was aware of the claim.

As stated in Berry v. Branner, 421 P.2d 996 (Ore. 1966), "to say to one who has been wronged, 'you had a remedy but

before the wrong was ascertainable to you, the law stripped you of your remedy;' makes a mockery of the law."

2. A.R.S. § 12-542(B) deprives the appellant of the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution because it grants physicians, surgeons and other licensed medical care providers an immunity from suit six years after the date of their acts, and because it deprives the appellant and all persons who have been injured by licensed medical care providers of their right to sue for damages if their injury is not discovered within six years of the negligent act. An injured party's claim would not be so barred in Arizona if the injury was caused by someone other than a licensed medical care provider.

In Truax v. Corrigan, 257 U.S. 312 (1921), this court held that an immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right is clearly a denial of equal protection. Under A.R.S. § 12-542(B), an injury inflicted by the negligence of a medical

intern (not a licensed physician) would not be barred if the malpractice was discovered after six years, but the same injury inflicted by a licensed physician or surgeon would be abrogated. The injury inflicted by a physician or surgeon who is a member of a professional corporation, if discovered more than six years after the act, would be barred as to the individual, but could be enforced as to the professional corporation which employed him. The classifications of the statute are discriminatory and arbitrarily deprive injured persons of their right to have their claims adjudicated, depending on the status of the person who inflicted the injury.

The inquiry to determine the validity of a state statute under the equal protection clause is a dual one: What legitimate state interest does the classification promote? And what fundamental personal rights might the classification endanger? Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972). The first question is purely rhetorical for this case. What legitimate state interest could possibly be served by the protection and immunity of

physicians or any other professionals, be they architects, engineers, or lawyers? There is no legitimate state interest promoted by the granting of special privileges and immunities to a professional class.

On the other hand, what fundamental personal rights does such a classification endanger? First and foremost, it deprives a proper plaintiff of recompense for injury negligently inflicted. Secondly, it ignores the cornerstone of American jurisprudence, that in the eyes of the law, all men are created equal and stand equal before a court of justice. It could hardly be gainsaid that those injured by the negligent acts of professionals should have the same rights to redress as those injured by the negligence of others.

Because the classification destroys fundamental personal rights without serving legitimate state interest, it must be struck down as an invidious denial of equal protection.

RELIEF REQUESTED

The federal questions presented in this appeal are substantial and indeed of great public importance. A declaration of the fundamental limitations of legis-

lative power in the enactment of medical negligence statutes is necessary at a time when legislatures across the land are faced with demands by professional health care providers for protection and immunity. This is a matter of first impression resulting from an acknowledged social crisis. Probably jurisdiction should be noted and the case set for argument on the merits.

Respectfully submitted,

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Of Counsel:
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June, 1976

APPENDIX A

Esther A. LANDGRAFF, Appellant,
v.
A. G. WAGNER, M.D., Samaritan Health Services, a corporation, Good Samaritan Hospital, a business association, and Frank R. Pracheny, M.D., Appellees.
No. 1 CA-CIV 2677.

Court of Appeals of Arizona,
Division 1,
Department A.
Feb. 5, 1976.

As Amended on Denial of Rehearing
March 10, 1976.

Medical malpractice action was brought by patient against health providers after discovery and removal of surgical clamp which had been left in patient's abdomen following surgery in 1962. The Superior Court, Maricopa County, Cause No. C-270826, Kenneth C. Chatwin, J., held that statute of limitations barred action against health providers and entered summary judgment in favor of defendants dismissing the case, and patient appealed. The Court of Appeals, Froeb, J., held that six-year statute of limitations relating to health providers was not unconstitutional, but that genuine issues of material fact existed as to whether the statute was tolled, and as to whether patient knew or should have known of presence of the surgical clamp in her abdomen, precluding summary judgment for health providers.

Judgment reversed, case remanded for further proceedings.

1. Constitutional Law ⇐48(3)

There is a strong presumption which favors constitutionality of legislative acts and reviewing court must be satisfied beyond a reasonable doubt before it will declare a statute unconstitutional.

2. Limitation of Actions ⇐4(2)

The phrase "right of action," as contained in constitutional section providing that the "right of action" to recover damages for injuries shall never be abrogated, is equivalent to the common-law action for negligence which, by reason of the provision, is imbedded in the Constitution, despite contention that subjective awareness by plaintiff of a claim for personal injury is raised to a constitutional level and is protected against legislation which will remove it as consideration in determining whether the period of limitation has run. A.R.S. § 12-542(B); A.R.S.Const. art. 18, § 6.

See publication Words and Phrases for other judicial constructions and definitions.

3. Limitation of Actions ⇐4(2)

Running of statute of limitations relating to health providers without awareness on the part of claimant is not equivalent to abrogation of the "right of action," within meaning of constitutional section stating that the right of action to recover damages for injuries shall never be abrogated; the limitation statute does not either annul, repeal, or destroy a right of action for personal injury, but merely qualifies it by providing for a reasonable period of time within which it must be brought. A.R.S. § 12-542(B); A.R.S. Const. art. 18, § 6.

4. Limitation of Actions ⇐4(2)

Even a constitutional right is subject to a reasonable statute of limitations, and reasonable restrictions do not "abrogate" the right to recover damages for injuries within meaning of constitutional section stating that the right of action to recover damages for injuries shall never be abrogated. A.R.S.Const. art. 18, § 6.

See publication Words and Phrases for other judicial constructions and definitions.

5. Limitation of Actions ⇐4(2)

Six-year statute of limitations relating to actions against health providers was a reasonable legislative restriction upon the right of action, even in view of its possible seemingly unfair effect upon a claimant who might be unaware of the claim. A.R.S. § 12-542(B).

6. Constitutional Law ⇐274(1), 278(1)

"Due process" is typically invoked to assure that rights and property are not taken by governmental authority without notice and an opportunity for a hearing.

See publication Words and Phrases for other judicial constructions and definitions.

7. Constitutional Law ⇐308

A reasonable period of limitation imposed by a statute does not offend the concept of due process or destroy the right involved.

8. Constitutional Law ⇐308
Physicians and Surgeons ⇐18.15

Claimant seeking to recover for medical malpractice is not denied due process where a reasonable period of limitation, as set forth in six-year statute of limitations relating to health providers, has barred the claim without awareness by claimant that he or she has been injured. A.R.S. § 12-542(B); Const. art. 2, § 4; U.S.C.A. Const. Amend. 14.

9. Constitutional Law ⇐249(3)
Physicians and Surgeons ⇐18.15

Six-year statute of limitations relating to health providers did not deprive medical malpractice claimant of equal protection of the law since claimant and all persons with claims for malpractice were affected equally by application of the statute because the period of limitations affected all persons within the class uniformly. U.S.C.A. Const. Amend. 14; A.R.S.Const. art. 2, § 13; A.R.S. § 12-542(B).

10. Constitutional Law ⇐208(1)

A state is not prohibited upon constitutional grounds from making classifications of persons and things or from passing laws applying to persons within a designated class, provided that the classification is neither arbitrary nor unreasonable; the propriety of any classification is for the legislature, and such will not be invalidated by the court unless it is whimsical, capricious, arbitrary or without reason.

11. Constitutional Law ⇐208(1)

One of the tests of the reasonableness of a legislative classification is whether there is a substantial difference between those within and those without the class.

12. Limitation of Actions ⇐4(2)

Importance to public of good health care and the problems which arise when malpractice claims are brought against health providers after passage of many years constitute sufficient reasons for the legislature to place health providers in a separate classification for this purpose, by means of special six-year statute of limitations relating to health providers. A.R.S. § 12-542(B).

13. Physicians and Surgeons ⇐18.15

The words "date of injury," within meaning of statute of limitations relating to health providers which states, inter alia, that a cause of action for injury or death shall accrue as of the "date of injury" and shall be commenced within six years after the "date of injury," must necessarily be the original act of malpractice; otherwise, where the effect of the malpractice might be continuous, there would never be an ascertainable date as contemplated by the statute. A.R.S. § 12-542(B).

See publication Words and Phrases for other judicial constructions and definitions.

14. Physicians and Surgeons ⇐18.15

Under section of six-year statute of limitations relating to health providers, which states "These time limitations shall be tolled for any period during which such [health provider] has failed to disclose any act, error or omission upon which such action is based and which through the use of reasonable diligence should have been known to him.", the health provider will lose protection of statute if reasonable diligence in the course of events which follow the malpractice would have made the malpractice apparent, and if such malpractice is not thereafter disclosed. A.R.S. § 12-542(B).

15. Physicians and Surgeons ⇐18.80(9)

Testimony of an expert is not required, in a case in which a surgical instrument has been left in patient's body after an operation, to establish the standard of medical care in the community, since the error is so self-evident that a jury can determine the question of negligence without reliance upon opinion of an expert, and by the same token the jury can also determine whether the health provider could have known of the mistake through the use of reasonable diligence so as to resolve the issue of whether the six-year statute of limitations was tolled. A.R.S. § 12-542(B).

16. Judgment ⇐181(7)

In medical malpractice action which was brought after discovery that surgical clamp had been left in patient's body in 1962 operation, genuine issue of material fact existed as to whether the six-year statute of limitations relating to health providers was tolled, precluding summary judgment for health providers. A.R.S. § 12-542(B).

17. Trial ⇐3(5)

In medical malpractice action arising out of the leaving in patient's body of a surgical clamp during 1962 operation, important procedural question of whether statute of limitations relating to health providers was tolled, which question could de-

termine whether a trial on merits was warranted, would have to await trial of the main issue, since it would appear impractical to try it separately. A.R.S. § 12-542(B).

18. Physicians and Surgeons ⇐18.15

The legislature intended in enacting statute providing that cause of action for injury or death against health provider shall accrue as of date of injury and shall be commenced and prosecuted within six years after date of injury or two years after injured party discovers or through the use of reasonable diligence should have discovered the malpractice, whichever period occurs first, that the actual or presumed knowledge of the cause of action by patient would bar the action after two years, regardless of whether it was tolled because of omissions of health provider. A.R.S. §§ 12-505(C), 12-542(B).

19. Judgment ⇐181(33)

In medical malpractice action which was brought after surgical clamp was discovered in patient's body following 1962 operation, genuine issue of material fact existed as to whether patient knew or should have known of presence of the surgical clamp in her abdomen, precluding summary judgment for defendant health providers. A.R.S. § 12-542(B).

Herring & Stephan, by Norman Herring, Phoenix, for appellant.

O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, by Donald E. Dyekman, Phoenix, for appellee A. G. Wagner, M.D.

Black, Robertshaw, Frederick, Copple & Wright, P.C., by Harold A. Frederick, Phoenix, for appellees Samaritan Health Services, Good Samaritan Hospital and Frank R. Precheny, M.D.

OPINION

FROEB, Judge.

This is a medical malpractice action brought by Esther A. Landgraff (appellant) after the discovery and removal of a surgical clamp which had been left within her abdomen following surgery.

The trial court found that the statute of limitations barred the action against the appellees, A. G. Wagner, M.D., Frank R. Precheny, M.D., Samaritan Health Services and Good Samaritan Hospital, and accordingly entered summary judgment in their favor dismissing the case. On appeal we are asked to review the judgment on two issues: namely, whether the applicable statute of limitations is constitutional and, if so, whether there are genuine issues of material fact which would preclude summary disposition.

The complaint alleged that appellant was operated upon for gallstones by Doctors Wagner and John Redman (not a defendant in the action) on September 25, 1962, and Doctors Wagner and Precheny on November 15, 1962, and that in one of the two operations a six-inch hemostat or steel surgical clamp was left within her abdomen. Following these operations she experienced some post-operative difficulty, but no X rays were taken and the clamp was not discovered. For many years following the operations she experienced pain, almost every day, but did not see a doctor. There is an indication in the record that while friends advised her to consult a doctor, her husband was opposed to it and she acquiesced in his wishes. Finally on September 8, 1971, more than nine years after the surgery in which the clamp was left within her, Esther Landgraff experienced acute pain and went to the emergency room at Good Samaritan Hospital where X rays revealed the presence of the surgical clamp. On September 11, 1971, the clamp was surgically removed. This suit was thereafter filed on December 6, 1972 for recovery of damages.

Following appropriate motions the trial court dismissed the action against all defendants on the ground that appellant failed to commence her action within six years after the date of the injury in accordance

with A.R.S. § 12-542(B) which reads as follows:

> A cause of action for injury or death against a physician or surgeon, dentist, registered nurse, dispensing optician, optometrist, registered physical therapist, podiatrist, licensed psychologist, osteopath, chiropractor, licensed clinical laboratory director, naturopath, or a licensed hospital as the employer of any such person, based upon such person's alleged professional negligence, or for rendering professional services without consent, or for error or omission in such person's practice, shall accrue as of the date of injury and shall be commenced and prosecuted within six years after the date of injury or two years after the injured party discovers or through the use of reasonable diligence should have discovered the malpractice, whichever period first occurs. These time limitations shall be tolled for any period during which such person has failed to disclose any act, error or omission upon which such action is based and which through the use of reasonable diligence should have been known to him.

The court also found that appellant failed to commence her action within one year from the date A.R.S. § 12-542(B) took effect as prescribed by A.R.S. § 12-505(C) which states:

> If an amendment of pre-existing law shortens the time of limitation fixed in the pre-existing law so that an action under pre-existing law would be barred when the amendment takes effect, such action may be brought within one year from the time the new law takes effect, and not afterward.

THE CONSTITUTIONALITY OF A.R.S. § 12-542(B)

[1] We recognize, at the outset, that there is a strong presumption which favors the constitutionality of acts of the legislature. *Arizona Podiatry Association v. Director of Insurance*, 101 Ariz. 544, 422 P.2d 108 (1966); *Selective Life Ins. Co. v. Equitable Life Assurance Society*, 101 Ariz. 594, 422 P.2d 710 (1967); *McKinley v. Reilly*, 96 Ariz. 176, 393 P.2d 268 (1964). Indeed, we must be satisfied beyond a reasonable doubt before we will declare a statute unconstitutional. *Shute v. State*, 8 Ariz.App. 447, 447 P.2d 262 (1968).

Several issues regarding the constitutionality of A.R.S. § 12-542(B) are raised by appellant.

The first involves the question of whether a statute of limitations can constitutionally bar a claim for personal injury where the claimant was never aware of the claim.

The general rule relating to whether a period of limitation will run against a claimant where he or she has no awareness of the claim is stated in 51 Am.Jur.2d *Limitation of Actions*, § 146:

> . . . the general rule in actions at law is that the mere fact that a person entitled to an action has no knowledge of his right to sue, or of the facts out of which his right arises, does not prevent the running of the statute or postpone the commencement of the period of limitation until he discovers the facts or learns of his right thereunder. . . .

This court has recently followed the rule in *Jackson v. American Credit Bureau, Inc.*, 23 Ariz.App. 199, 531 P.2d 932 (1975) (no constitutional issue raised). Since it is often seen as leading to a necessarily harsh result, courts have made exceptions to it, particularly in the medical malpractice field. This court, for example, held in *Mayer v. Good Samaritan Hospital*, 14 Ariz. App. 348, 482 P.2d 497 (1971) that the period of limitation under the predecessor to A.R.S. § 12-542(B) did not begin to run until the patient knew or should have known of the malpractice. This interpretation of the statute of limitations, often referred to as the "discovery" rule, has been widely adopted in other states as well. See: *Statutes of Limitations and Undiscovered Malpractice*, 16 Cleveland-Marshall Law Review 65 (1967) and 80 A.L.R.2d

368, When statute of limitations commence to run against malpractice action against physician, surgeon, dentist, or similar practitioner.

Appellant concedes that absent a controlling constitutional provision, the legislature may enact a statute of limitations which will run despite the claimant's lack of awareness of the claim. She argues, however, that in Arizona such a limitation on an action to recover for personal injuries is unconstitutional by reason of Article 18, § 6 of the Arizona Constitution, which reads:

> The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

[2-5] Her contention is that the "right of action" set forth in Article 18, § 6 of the Arizona Constitution implies subjective awareness of the right. She argues that subjective awareness of a claim for personal injury is thus raised to a constitutional level and is protected against legislation which would remove it as consideration in determining whether the period of limitation has run. We disagree, however, that this meaning can be read into Article 18, § 6. We hold that the "right of action" mentioned in the constitutional provision is equivalent to the common law action for negligence which, by reason of the provision, is embedded in the Constitution. See *Alabam's Freight Co. v. Hunt*, 29 Ariz. 419, 242 P. 658 (1926). We are referred to no case which holds that subjective awareness of the claim is something which necessarily flows from the constitutional language and we decline therefore to attribute this meaning to it. Likewise, we do not agree that the running of the statute of limitations without awareness on the part of the claimant is equivalent of "abrogation" of "the right of action." To "abrogate" means "to annul, repeal, or destroy." Black's Law Dictionary (Rev. 4th Ed.). A.R.S. § 12-542(B) does not either annul, repeal or destroy the right of action for personal injury. It does qualify it, however, by providing for a reasonable period of time within which it must be brought. The Arizona Supreme Court has held that even a constitutional right is subject to a reasonable statute of limitations. *Rutledge v. State*, 100 Ariz. 174, 412 P.2d 467 (1966). Reasonable restrictions do not "abrogate" the right to recover damages for injuries. We find the statute of limitations under review here to be a reasonable legislative restriction upon the right of action even in view of its seemingly unfair effect upon a claimant who was unaware of the claim.

Appellant asserts that A.R.S. § 12-542 (B) deprives her of a constitutionally protected right of action without due process in violation of Article 2, § 4 of the Arizona Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

[6-8] Due process is a concept more difficult to define than it is to apply. It is typically invoked to assure that rights and property are not taken by governmental authority without notice and an opportunity for hearing. In the context of a statute of limitations, we recognize that a reasonable period of limitation imposed by statute does not offend the concept of due process or destroy the right involved. See *United States v. Morena*, 245 U.S. 392, 38 S.Ct. 151, 62 L.Ed. 359 (1918). See also *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945). There is no contention that the time period set forth in A.R.S. § 12-542(B) is unreasonable. The only issue is whether the running of the statute without awareness of the right of action by the claimant offends the concept of due process. In part, we have already answered this question when we determined that subjective awareness was not a necessary element of a "right of action." While the concept of due process sweeps even more broadly than Article 18, § 6 of the Arizona Constitution, we do not agree that due process demands awareness of the right of action before the statute of

limitations will run against it. There are innumerable instances, of which this is merely one, where the legislature has determined that rights will be altered and sanctions imposed wholly apart from whether the person affected gained personal awareness. In this sense, legislative policy is controlling. We must assume that by enacting A.R.S. § 12-542(B), the legislature weighed the conflicting policies which are inherent in any statute of limitations, namely, the merit of bringing repose to old claims and the detriment of foreshortening just claims however tardily asserted. We hold that a claimant is not denied due process of law where a reasonable period of limitation has barred the claim without awareness by the claimant that he or she has been injured. Whether the legislative policy behind the statute is good or bad is not for us to determine.

[9] It is next contended that the statute deprives appellant of the equal protection of the law guaranteed by Article 2, § 13 of the Arizona Constitution and the Fourteenth Amendment to the United States Constitution. We find this argument without merit since she and all persons with claims for malpractice are affected equally by the application of A.R.S. § 12-542(B). The period of limitation affects all people within the class uniformly. Appellant raises, as part of her argument concerning equal protection, Article 2, § 13 of the Arizona Constitution which provides that no law shall grant privileges or immunities to one class of citizens not granted equally to others. Thus, her constitutional attack is lodged against the classification of "health providers" as a group, contending that it is unreasonable that they be granted special protection by the statute. We do not agree.

[10] A state is not prohibited upon constitutional grounds from making classifications of persons and things or from passing laws which apply only to persons within a designated class, provided the classification is neither arbitrary nor unreasonable. The propriety of any classification is for the legislature and will not be invalidated by the court unless it is whimsical, capricious, arbitrary or without reason. See *Valley National Bank of Phoenix v. Glover*, 62 Ariz. 538, 159 P.2d 292 (1945); *Schrey v. Allison Steel Mfg. Co.*, 75 Ariz. 282, 255 P.2d 604 (1953).

[11, 12] One of the tests of the reasonableness of a classification is whether there is a substantial difference between those within and those without the class. *Farmer v. Killingsworth*, 102 Ariz. 44, 424 P.2d 172 (1967), *Edwards v. Alhambra Elementary School Dist.*, 15 Ariz.App. 293, 488 P.2d 498 (1971). In this case, the broad category of persons within the class are referred to as "health providers." We find that the importance to the public of good health care and the problems which arise when malpractice claims are brought against health providers after the passage of many years constitute sufficient reasons for the legislature to place them in a separate classification for this purpose. In finding a rational basis to the classification, we are supported by decisions from other states. See, for example, *McCarty v. Goldstein*, 151 Colo. 154, 376 P.2d 691 (1962); *Sellers v. Edwards*, 289 Ala. 2, 265 So.2d 438 (1972). To the contrary, see *Fujioka v. Kam*, 514 P.2d 568 (Hawaii 1973).

IS THE DATE OF INJURY A QUESTION OF FACT?

[13] Appellant urges us to hold that the point in time when the "injury" occurred is a disputed question of fact requiring reversal of the summary judgment. As appears from the statute, quoted above, the cause of action for malpractice "shall accrue as of the date of injury . . .". When was the date of injury in this case? Appellant suggests that it could just as well have been September 8, 1971 when the clamp was surgically removed, as September 25 or November 15, 1962 when it was first left inside her. We are unable to give the statute such a construction, however, for it appears clear that the legisla-

ture intended the date of injury in this type of case to be the date on which the foreign object was left within the patient's body. First, the words "date of injury" imply a single date in time, not multiple dates. On such a basis the date of injury must necessarily be the original act of malpractice, for otherwise, where the effects of the malpractice may be continuous, there would never be an ascertainable date as contemplated by the statute. While the results of the original injury may continue, even to the point of further surgery to correct it, we believe the legislature intended the date of injury to be the point at which the malpractice first occurred. Assuming this to be the case, the date may nonetheless be a question of fact in some cases, but here there is no factual dispute that the date of the operation involving the hemostat was either September 25 or November 15 of the year 1962. Moreover, a reading of paragraph B of A.R.S. § 12-542 in its entirety confirms this. The requirement that the patient bring the action within two years of the date when he knew or should have known of the malpractice would be rendered meaningless if the period was not deemed to begin when the initial act of malpractice occurred. Otherwise it would be possible for a patient to know full well that the malpractice had occurred, yet the two year period would not begin to run until a later event connected with the malpractice, such as the surgical removal of the offending foreign body. This obviously would make no sense and is clearly against the intent of the statute.

Our conclusion is supported by the legislative background of A.R.S. § 12-542(B). In 1971 when *Mayer v. Good Samaritan Hospital*, supra, was decided by this court, the predecessor statute of limitations provided that an action for personal injury (which included an action for malpractice) had to be "commenced and prosecuted within two years after the cause of action accrues . . .". A.R.S. § 12-542. In *Mayer*, this court adopted the so-called "discovery" rule as to medical malpractice actions, construing the language of the statute to mean the period of limitation commenced to run when the malpractice was known or should have been known by the plaintiff. In its opinion, the court noted that:

> The legislature is better equipped than the courts to take into consideration whether an outside time limitation should be put on a "discovery" oriented statute of limitations, and the length of such a limitation.
>
> * * * * * *
>
> If the legislature concludes that our determination of their intention be incorrect, or if correct, desires to place outside limitations on actions such as this, it is more than appropriate that they should do so. [14 Ariz.App. at 252–253, 482 P.2d at 501].

This is precisely what occurred in 1971 when A.R.S. § 12-542 was amended to provide for a maximum period of six years within which medical malpractice actions must be brought. As this intention appears clear, then so too does the intention that the period is to begin upon the occurrence of the negligent conduct not upon its later consequences. The "date of injury" then is the date the claimed negligent conduct first was imposed upon the patient. The time is not measured from the point at which damages resulting from the "injury" either appear or disappear.

ISSUES OF FACT REQUIRING TRIAL

There are two issues of fact which we find necessitate reversal of the summary judgment entered by the trial court. The first is whether the period of limitation was tolled because either one or all of the *appellees* failed to disclose the claimed negligent act when they either knew or should have known of it. The second is whether *appellant* knew or should have known of the presence of the surgical clamp.

As for the first question, the last sentence of A.R.S. § 12-542(B) is pertinent:

> These time limitations shall be tolled for any period during which such [health provider] has failed to disclose any act, error or omission upon which such action is based and which through the use of reasonable diligence should have been known to him.

[14] Since the sentence is ambiguous, we must construe it before it is applied to the facts of the case. Does the tolling provision come into play because the claimed act of malpractice is not discovered in the course of treatment *following* the malpractice or does it become effective upon the occurrence of the malpractice even if there is no follow-up treatment? The language of the statute when read literally would seem to suggest that the test of reasonable diligence in discovering the malpractice could be applied to the act itself, even if there was no follow-up treatment. This would, in a sense, make the tolling provision dependent upon the outcome of the case, since the test for malpractice and the test for reasonable diligence in discovering it would be nearly identical. Since it does not appear that the legislature intended the tolling provision to be contingent upon this alone, we must assume that the test of reasonable diligence is applied to the follow-up treatment given the patient after the act of malpractice has occurred. Thus, in the course of events which follow the malpractice, the health provider will lose the protection of the statute of limitations if reasonable diligence would have made the malpractice apparent and it is not thereafter disclosed. This would appear to be the more reasonable interpretation of this statutory provision.

Appellant argues that whether the negligent act upon which the action is based should have been known and thus disclosed to the appellant is a question of fact which should not have been determined by the trial court on summary judgment. Appellees contend that there is no genuine issue raised because there is no expert testimony in the record that adherence to the standard of medical practice in the community would have resulted in the discovery of the negligent act.

[15] It must be remembered we are dealing here with a surgical instrument which was left within the appellant's body after an operation. In our opinion the testimony of an expert is not required in this instance to establish the standard of medical care in the community. The error is so self-evident that a jury can determine the question of negligence without reliance upon the opinion of an expert. By the same token the jury can also determine whether the appellees could have known of the mistake through the use of "reasonable diligence" so as to resolve the issue of whether the statute of limitations was tolled.

[16, 17] Thus whether the statute of limitations was tolled is a question of fact to be determined by the trier of fact. Unless it is tried separately in advance of trial, it becomes an issue in the case in chief. It appears then that this case (and perhaps most others) this important procedural question, which could determine whether a trial on the merits is warranted, must await trial of the main issue, since it would appear impractical to try it separately. While the issues are not identical, it is difficult to believe that a jury would determine the medical malpractice issue differently from the statute of limitations issue, since the underlying question is nearly the same. By reason of this, A.R.S. § 12-542(B) has a built-in problem in that it creates specific time limits within which an action must be brought, but as a practical matter will often require the case to be tried first to determine if those time limits should be applied. The problem, however, is one for consideration by the legislature, not the court.

We turn now to the second fact question, namely, whether *appellant* knew or should have known of the presence of the surgical clamp in her abdomen. The issue

is raised because the record indicates she experienced physical difficulties at certain times but chose not to seek medical advice or evaluation.

[18, 19] If it is determined appellant should have known of the surgical clamp more than two years before the action was filed, the action is barred. This is so, even though it might be determined that the tolling provision discussed earlier stopped the running of the statute in favor of appellant. We reach this conclusion because it appears quite clearly, in juggling the two provisions, to be the legislative intention that the actual or presumed knowledge of the cause of action by the patient will bar the action after two years regardless of whether it is tolled because of the omissions of the health provider.

On the other hand, if it is determined that appellant had no reason to know of the malpractice, is the action nevertheless barred? This depends upon whether the statute was tolled in her favor because of the duty of reasonable diligence placed upon the health provider. If it was tolled until the discovery of the surgical clamp on September 8, 1971, her action was timely filed, since she then had two years within which to file it. It follows, of course, that the one-year salvage period of A.R.S. § 12-505(C), quoted earlier, never takes effect because A.R.S. § 12-542(B) would not then have shortened the period for filing which she would have had under previous law. If, however, it is determined that the tolling provisions do not take effect and operate in her favor, then six years would have run under A.R.S. § 12-542(B), the effect of which would be to shorten the period which was in effect when A.R.S. § 12-542(B) was enacted (two years from actual or presumed discovery). This would then invoke A.R.S. § 12-505 (C) which sets up a one-year salvage period for filing the action beginning on August 13, 1971 (which was the effective date of A.R.S. § 12-542(B)). Since appellant's action was filed approximately one year and four months after August 13, 1971, her action would necessarily be barred.

As it is necessary for the trial court to determine these fact issues under this complicated and seemingly unworkable statute of limitations, we reverse the judgment and remand the case for further proceedings consistent with this opinion.

DONOFRIO, P. J., and OGG, J., concurring.

APPENDIX B

CLIFFORD H. WARD
CLERK

Supreme Court

STATE OF ARIZONA
Phoenix
85007
March 31, 1976

MARY ANN HOPKINS
CHIEF DEPUTY CLERK



ESTHER A. LANDGRAFF,

Appellant,

vs.

A. G. WAGNER, M.D.; SAMARITAN HEALTH SERVICES, a corporation; GOOD SAMARITAN HOSPITAL, a business association; and FRANK R. PRECHENY, M.D.,

Appellees.

Supreme Court
No. 12560-PR

Court of Appeals
No. 1 CA-CIV 2677

Maricopa County
No. C-270826

The following action was taken by the Supreme Court of the State of Arizona on March 30, 1976 in regard to the above-entitled cause:

"ORDERED: Petitions for Review - DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 31st day of March, 1976.

CLIFFORD H. WARD, Clerk
By Mary Ann Hopkins
Deputy Clerk

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Supreme Court No. 12560-PR
Court of Appeals No. 1 CA-CIV 2677
Maricopa County No. C-270826

March 31, 1976
Page Two

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APPENDIX C

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

ESTHER A. LANDGRAFF,

Appellant,

vs.

A. G. WAGNER, M.D.; SAMARITAN HEALTH SERVICES, a corporation; GOOD SAMARITAN HOSPITAL, a business association; and FRANK R. PRECHENY, M.D.,

Appellees.

Maricopa County
Superior Court
No. C 270826

Court of Appeals
No. 1 CA-CIV 2677

Supreme Court
No. 12560-PR

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

NOTICE IS HEREBY GIVEN that the appellant, Esther A. Landgraff, appeals to the Supreme Court of the United States of America from the decision and opinion of the Court of Appeals of the State of Arizona entered February 5, 1976, and from the Order of the Supreme Court of the State of Arizona denying appellant's Petition for Review entered on March 30, 1976.

This appeal is taken pursuant to Title 28, U.S.C. § 1257(2).

DATED June 25, 1976

Norman Herring
Attorney for Appellant
Esther A. Landgraff

PROOF OF SERVICE

I, Norman Herring, attorney for appellant Esther A. Landgraff, certify service of the foregoing Notice of Appeal in compliance with Rule 33(1), Rules of the Supreme Court of the United States, by depositing the same on June 25, 1976, in the United States Post Office box with first class postage prepaid, addressed to the following counsel of record at his post office address as indicated, constituting all parties required to be served:

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1700 West Washington
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/s/

APPENDIX D

§ 12-542. Injury to person; injury to property; conversion of property; forcible entry and forcible detainer; two year limitation; exception.

A. Except as provided in subsection B, there shall be commenced and prosecuted within two years after the cause of action accrues, and not afterward, the following actions:

1. For injuries done to the person of another.

2. For injuries done to the person of another when death ensues from such injuries, which action shall be considered as accruing at the death of the party injured.

3. For trespass for injury done to the estate or the property of another.

4. For taking or carrying away the goods and chattels of another.

5. For detaining the personal property of another and for converting such property to one's own use.

6. For forcible entry or forcible detainer, which action shall be considered as accruing at the commencement of the forcible entry or detainer.

B. A cause of action for injury or death against a physician or surgeon, dentist, registered nurse, dispensing optician, optometrist, registered physical therapist, podiatrist, licensed psychologist, osteopath, chiropractor, licensed clinical laboratory director, naturopath, or a licensed hospital as the employer of any such person, based upon such person's alleged professional negligence, or for rendering professional services without consent, or for error or omission in such person's alleged professional negligence, or for rendering professional services without consent, or for error or omission in such person's practice, shall accrue as of the date of injury and shall be commenced and prosecuted within six years after the date of injury or two years after the injured party discovers or through the use of reasonable diligence should have discovered the malpractice, whichever period first occurs. These time limitations shall be tolled for any period during which such person has failed to disclose any act, error or omission upon which such action is based and which through the use of reasonable diligence should have been known to him.

C. Subsection B shall not be construed nor intended to modify any rights a minor or incompetent person may otherwise have at law.